Hard Lessons Learned in Legal Professionalism

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I. Introduction – Professionalism Sets A Higher Bar Than The Ethics Rules.

In 1989, the Supreme Court of Georgia created the Chief Justice's Commission on Professionalism "in an attempt to maintain in some instances and establish in others, a sense of civility and courtesy among lawyers."[1] The Court was reacting to trends of commercialization and loss of professional community in the practice of law, which "manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and lack of regard for others and for the common good."[2] The Court instead sought to refocus the legal profession toward a recognition that the primary justification for who lawyers are and what they do is the common good that can be achieved

It is important to note that the Rules of Professional Conduct are separate and distinct from professionalism considerations, which are "non-mandatory" and "aspirational."[3] Professionalism considerations are "intended to encourage courtesy, civility, and respect among members of the profession," while ethical rules "can be regarded as a subspecies of legislation – rules that differ from law only in that their enforcement is relatively informal."[4] In drawing the distinction between

[1] *Green v. Green*, 263 Ga. 551, 553 (1993).
[2] Aspirational Statement on Professionalism.
[3] *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374, 376 n.5 (1995).
[4] *Id.* (quoting G. Hazard, *Ethics in the Practice of Law*, (1978), as reprinted in G. Hazard and S. Koniak, *The Law and Ethics of Lawyering*, (1990)).

professionalism and ethics, Chief Justice Harold Clarke frequently stated that "ethics is that which is required and professionalism is that which is expected."[5]

The Georgia Supreme Court recognized that there can be tension between the ideals of professionalism and the zealous advocacy of clients. "On one hand, the practice of law is dependent to a great extent on lawyers having respect for each other, honoring their promises, cooperating with others, and according each other a high degree of civility. On the other hand, lay persons sincerely believe that when a justiciable issue arises, if they so desire they will be accorded their 'day in court.'"[6] The Court further recognized that the expectations of both lawyers and lay persons are "reasonable and are fully contemplated by our system of jurisprudence. Therefore, when these expectations are not fulfilled, there is understandable discontent with our system of justice."[7]

Despite this tension, if "the bar is to maintain the respect of the community, lawyers must be willing to act out of a spirit of cooperation and civility and not wholly out of a sense of blind and unbridled advocacy."[8] The Supreme Court has emphasized that the Rules of Professional Conduct set forth only a minimum level of acceptable conduct and that as members of an honorable profession, lawyers must be willing to conduct their business in a manner consistent with the higher standards embodied in the aspirational goals of the professionalism movement.[9] The Court created a list of

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[5] *Green*, 263 Ga. at 553-54.
[6] *Id.* at 554.
[7] *Id.*
[8] *Id.*
[9] *Id.* (quoting *Evanoff v. Evanoff*, 262 Ga. 303, 304-05 (1992) (Benham, J., concurring). *See also* Rules of Professional Conduct Preamble: A Lawyer's Responsibilities Comment 6 ("A lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as by substantive and procedural law. A lawyer is also guided by

General Aspirational Ideals not for the purpose of regulating or as the basis of attorney discipline "but rather to assist the Bar's efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community."[10]

II. Effective Client Communication

"To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust."[11] The hallmark of the highest standard of professional practice is responsive, effective communication with clients on a consistent basis. In the year 2022, clients demand communication that responds to their concerns and keeps them informed on the timetable that they prefer. Many clients prefer responses from their attorney on a very rapid if not instantaneous basis. Others expect that their counsel will get back to them when it is possible to do so and do not have a problem if they do not receive a response immediately or even the same business day.

The key is to learn the communication preferences of each client and to communicate in the way and with the timing that works best for that client. That could be text messages swapped after hours, emails sent during the business day, or telephone conferences held on a regularly scheduled basis. Above, all, however, the attorney should ensure that the communication that he or she is providing is serving the goal of providing the information that the client needs for informed decision-making on the

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conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."

[10] Aspirational Statement on Professionalism. The complete text of the General Aspirational Ideals is set forth in the appendix at the end of this paper.

[11] A Lawyer's Creed lines 2-5.

matter at hand. This applies whether the attorney is in-house counsel dealing with internal clients or whether the attorney is outside counsel.

A. Provide Objective and Independent Advice to Clients

As part of facilitating fully-informed decision-making, the attorney should maintain "the sympathetic detachment that permits objective and independent advice to clients."[12] When an attorney has been in the trenches with a client, especially in the litigation context, it is easy for the attorney sometimes to develop a bunker mentality along with the client. While it is necessary and appropriate for the attorney to support the client and to do everything called for legally and ethically to advance the client's position, it is crucial that the attorney not become so wedded to that position that it becomes impossible for the attorney to provide objective legal advice regarding the situation. The attorney still has to maintain enough of the role of outsider that the attorney is still able to give advice as an independent voice of reason.

This is particularly true where the client is involved in hard-fought or protracted litigation. It is fine for the client to be a "true believer" in the righteousness of his cause and to believe that he will ultimately prevail. However, the attorney must be careful to remain a steely-eyed realist throughout. If at some point, the facts developed through discovery are not supporting the client's position and the case appears that it will not be decided in the client's favor, it may be wise to consider an exit strategy such as settling the case. If the attorney develops doubts that a successful outcome of the litigation is possible, he or she should clearly advise the client of this, in writing, and allow the client to make an informed decision regarding how to proceed.

[12] Specific Aspirational Ideas at ll. 79-80.

The attorney should take this step even if the client is paying fees for the litigation and indicates a willingness to continue to pay fees through the end of trial and even beyond. The attorney needs to let the client know that he or she could be incurring these fees with little chance of obtaining a recovery or of preventing a judgment. If the client is fully advised of the facts and possible outcomes and elects to continue, and the attorney's view is that there is still some merit in the client's position, then the attorney may continue to prosecute the case. The attorney should also be careful to advise the client of the possibility of continuing to litigate leading to a chance of an attorney's fees award to the opposing party at the end of the case. The bottom line is that the attorney cannot let his or her position as the client's advocate subsume the attorney's role as the client's counselor and advisor.

B. Consideration of Alternative Fee Arrangements

The attorney should aspire to fair and equitable fee arrangements and should discuss alternative methods of charging fees with clients.[13] Most attorneys, particularly on the defense side, usually default to the familiar fee arrangement of billing the client by the hour for the attorney's work. However, this may not always be the best approach in ever case. At the beginning of a new representation, the attorney and client should think critically and creatively regarding whether an alternative fee arrangement may better suit the client's needs and the needs of the particular engagement.

For example, our firm has used a number of different types of fee structures over the years. These include flat fees or splitting matters into segments with different flat fees for each segment of the representation. We have also used a hybrid model that

[13] Specific Aspirational Ideas at ll. 84-85.

consists of a preliminary flat fee for the initial period of the representation followed by hourly billing for the remainder of the engagement. Additionally, we have used a structure with reduced hourly rates charged during the course of the matter, followed by a success bonus at the completion of the matter.

It makes sense to consider alternative fee arrangements because they simply may be fairer to the client. For example, a particular matter may be of value to the client only if it can be undertaken for a total fee that does not exceed a certain dollar figure. A flat fee at or below that figure would provide certainty to the client and would incentivize the attorney to complete the work as efficiently as possible. Certainty and efficiency in the fee would certainly be fair and equitable for the client.

Finally, no matter what fee arrangement is used, the attorney and client should agree on the fee arrangement and set it out in a written engagement letter prior to the attorney beginning work on the project. Sometimes there may be an emergency situation in which the attorney needs to begin work right away, before an engagement letter can be signed, but this should be by far the exception and not the rule. And, if the attorney and client agree to change the fee structure in any way during the course of the representation, the parties should execute an amended engagement letter or memo that clearly sets out the new fee structure and that makes clear to what work the new fee structure will apply.

For example, the attorney is defending the client in litigation and is handling the matter on an hourly basis. The plaintiff files a motion to compel, and the attorney agrees to handle the discovery dispute for a flat fee. The parties should sign an amendment to the engagement letter setting out exactly what work will be covered by the flat fee (e.g., response to motion, preparation for hearing on motion and conducting

the hearing on the motion, preparation of a proposed order for the court's consideration) and the amount of the flat fee. Then, the attorney must clearly segregate all of the flat fee work in the attorney's bills so there is a readily-identifiable distinction between it and between the hourly work on the file that the attorney will be continuing to handle at the same time.

C. Maintenance of Attorney-Client Confidentiality

The attorney should aspire to comply with his or her obligations of confidentiality "in a manner designed to achieve the fidelity to clients that is the purpose of" that obligation.[14] It is absolutely crucial to remember that the attorney-client privilege can be waived inadvertently through the disclosure of otherwise protected communications to third parties.[15] Accordingly, the attorney needs to make clear to the client at the outset of the reputation that the client's communications with the attorney regarding the matter must not be shared with third parties. This includes forwarding emails from the attorney as well as passing along the attorney's legal advice verbally. Further, in this day and age of remote work, both the attorney and the client need to be careful not to carry on privileged conversations in public places where protected information could be overheard, potentially endangering the privilege.

The attorney should also periodically remind the client of the need to protect the confidentiality of attorney-client communications. Over the course of a longer representation, such as litigation that lasts multiple years, people have the tendency to

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[14] Specific Aspirational Ideas at ll. 93-95.

[15] *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 504 (2002). *See also Chattanooga-Hamilton Cty. Hosp. Auth. v. Hosp. Auth. of Walker*, No. 4:14-CV-0040-HLM, 2015 WL 11622949, at *6 (N.D. Ga. May 11, 2015) ("Typically, the attorney-client privilege is 'readily waived by disclosure to a third party.'").

let their guard down or to forget about this. The attorney should also make sure that he or she is continuing to work on the client's matter in the ways that best protects the privilege. For example, in working with experts and potential experts, it is a good idea to conduct as many of these communications as possible verbally, to avoid creating a written record of disclosures that may have to be disclosed at some point. Again, the goal should be to guard the client's confidential information to the greatest extent possible and to disclose it only as necessary for purposes of performing work on the client's matter.

D. Managing Client Expectations

It is important to manage client expectations from the very beginning of the representation. When prospective clients approach the attorney, the attorney should attempt to give them a clear, realistic view of what is possible to accomplish during a potential engagement. If it is not possible to accomplish the prospective client's goals or unrealistic to accomplish them, the attorney should be clear with the client on this point. The attorney of course may want to do some "selling" of the attorney's ability to help the client get where the client wants to go in order to secure the representation, but the attorney should be careful not to give the client unworkable expectations in the process. It is not fair to the client or the attorney to have their relationship be based on unrealistic expectations about what can be accomplished or the likelihood of success. It is also quite unsettling to have a client bring up predictions made at the beginning of the case months or years down the road as the basis for why the client is unhappy with how the client's matter is proceeding, when the real reason for the client's unhappiness is an event or events that could not possibly have been foreseen at the time the representation began.

Clients (and internal clients are likely no different) will sometimes want the attorney to give a prediction on the likelihood of the client achieving the desired outcome, whether that is winning a case or something different, as if the attorney is a meteorologist forecasting the chance of rain for the next day. In our experience, it is always best to avoid assessing a case in terms of percentages, because litigation is largely unpredictable and because clients will seize on something like a percentage chance of success and not let go of it, not matter what comes later in the case. It is simply too difficult to make these kinds of "80% chance of rain" predictions in most disputes, and it is poor communication to give clients a false sense of certainty. Instead, it is usually better to assess what the stronger parts of a client's case are and what the weaker parts are, and to explain to the client how the strong points will be used to try to overcome the weak points to help the client win its case.

Moreover, if the attorney's assessment of the case changes over time (which should almost always happen, if the attorney is keeping track of the case as it goes along), the attorney should never hesitate to update the client on how the assessment has changed. Perhaps new, previously unknown facts mean what was thought to be the client's best defense is now tenuous at best. Or, perhaps the law has changed to make the client's burden of proof more difficult to meet. Or, maybe the key witness changed her testimony between the time of the incident and her deposition, making summary judgment in favor of the opposition a real danger. Whatever the development, the attorney should make sure that the client is informed about it and how it has affected the possibility of a successful outcome. The attorney has a duty to keep the client informed, and the client should not be surprised by a negative outcome at the end of the

case based on changes in the facts or law that were not properly brought to the client's attention during the course of the case.

III. Dealing With Difficult Opposing Counsel

A. Requests for Extensions

The attorney is to "cooperate with opposing counsel in a manner consistent with the competent representation of all parties."[16] As a professional, the attorney should grant "reasonable requests for extensions or scheduling changes."[17] The Aspirational Ideals make clear that attorneys are to work together and cooperate to ensure that all parties, not just their own clients, receive competent representation. As part of this, attorneys should typically agree to reasonable extensions requested by opposing counsel unless there is a compelling and/or case-substantive reason not to do so. Attorneys, as officers of the court, are responsible for making sure that cases are adjudicated fairly for all parties and should not attempt to take advantages for their clients simply because it is possible to do so.

From a practical standpoint, litigators recognize that over the life of a case, there will come a time at which they will need additional time to complete a piece of work for the case. This could be caused by any number of reasons, such as being sick, being out of town for vacation, being tied up with work in other matters, client unavailability to assist with needed information, or other reasons. Therefore, when opposing counsel calls to request an additional week to respond to discovery requests or an additional 10 days to respond to a motion, the attorney should not have a problem saying yes, both

[16] Specific Aspirational Ideas at ll. 97-98 (emphasis added).
[17] *Id.* at l. 100.

because it is the fair thing to do and because the attorney knows that it is quite likely that down the road, he or she will be in the position of making a similar request.

Our usual approach is to agree to grant reasonable extensions and simply to keep clients informed regarding changing deadlines as necessary. Some clients have requested that all extension requests be run by them first or have tried to instruct that no extensions ever be granted, for any reason. As explained above, this is not the best practice because the shoe soon could be on the other foot. No matter how much the client dislikes the opposing party and wants to try to punish the opposing party, the client needs to realize that at some point, the client and his or her attorney will likely need more time to finish something, and refusing to cooperate is not the way to achieve the best outcome in the case.

Of course, there are limits to all of this. If opposing counsel is constantly requesting extensions or requesting very long extensions, this could add up to delay resolution of the case. There is a difference between being cooperative and allowing opposing counsel to take advantage to get away with being obstructionist or being too unmotivated to get the required work in a case completed in a timely manner. At some point, the attorney may have to not agree to an extension or only agree to a shorter extension than the one requested, because the attorney also has a duty to try to get disputes resolved in a timely manner. In dealing with these problematic requests, the attorney may actually want to run them by the client so that if the client resists, the attorney can give that as part of the reason for not agreeing to the extension or to the full amount of time requested.

B. Non-responsiveness

The attorney is to "treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice." As part of this, the attorney should "[r]espond promptly to all requests by opposing counsel."[18] This is perfect in theory, but in practice, some attorneys are simply non-responsive. They don't answer emails. They don't return phone calls. They are basically impossible to reach or to communicate with effectively. They clearly do not believe in the professionalism tenet of cooperation. What is an attorney to do when placed in the situation of dealing with a practitioner such as this?

The best approach is to continue to try to communicate with the non-responsive attorney and to document all attempts to do so. Save all of your emails to the attorney and be prepared to present them in chronological order. If you leave a voicemail message for the attorney, follow it up with an email stating that you left the message. For more formal communications, send a letter, and have it delivered by more than one means (such as email and U.S. mail or FedEx), so that the attorney cannot realistically claim later that he did not receive the communication.

In short, continue to give the non-responsive attorney every opportunity to communicate because it is the right thing to do and so that if it is ever necessary, you can show a judge that you attempted at every turn to work with the attorney, and all of those attempts were rebuffed. Treat the case as if only unilateral action will be possible, but keep the door open to the non-responsive attorney eventually coming around and living up to his or her professional responsibilities.

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[18] Specific Aspirational Ideas at ll. 103-04, 109.

C. Attempts to Use Bullying Tactics

Attorneys should be "courteous and civil in all communications" and should "[a]void rudeness and other acts of disrespect in all meetings including depositions and negotiations."[19] Despite these ideals, we all know attorneys who are discourteous, uncivil, rude, and disrespectful in their dealings with opposing counsel. They attempt to get their way through bullying tactics and attempting to cow everyone into doing what they want to do. How is an attorney to deal with a practitioner such as this while maintaining the attorney's professionalism and not sinking to the level of the bully?

The number one recommendation is to deal as much as possible with an attorney of this ilk in writing. Do not give the bully an opportunity to misrepresent your words from a telephone call. Put everything into a letter or an email so that the record is clear. Above all else, be civil to the bully and do not attempt to fight fire with fire. Establish your position and advocate for it calmly and reasonably. It may be tempting to return fire at your opponent in a motion, brief, or other filing with the court, but it is important not to let your emotions get the better of you. Professionalism calls for the exercise of courtesy, and discourteous or disparaging personal remarks are forbidden in court filings.[20]

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[19] Specific Aspirational Ideas at ll. 108, 110-11.

[20] *See Murphy v. Freeman*, 337 Ga. App. 221, 228 (2016) ("We do not and we will never equate contempt with courage or insults with independence."). The Georgia Court of Appeals in that case fined appellant's counsel $2,500 for a repeated pattern of insulting and disparaging remarks about opposing counsel and trial court judges. *Id.* at 229.

IV. Dealing With Courts

A. Not Wasting Court Time and Resources

Counsel should avoid "non-essential litigation and non-essential pleading in litigation;" avoid "all delays not dictated by a competent presentation of a client's claims;" and prevent "misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual."[21] Attorneys should always strive to guard the court's resources and to only utilize them when absolutely necessary. Attorneys should further ensure that when they are in court, they are prepared to the utmost degree so that there is no wasted time in their presentation or argument. For example, judges and juries become very frustrated by attorneys shuffling through their papers and not being ready to speak when it is their turn. This exhibits poor professionalism and is a real detriment to the client's case.

B. Creative Settlement Options and Mediation

Attorneys should "[e]xplore the possibilities of settlement of all litigated matters."[22] A key ingredient in successfully settling a dispute is often timing. Sometimes disputes are easiest to settle prior to any litigation being filed. Sometimes an early mediation following the initial pleading stage makes sense. And other times, settlement is only realistically possible following full discovery, including both fact and expert witnesses. The attorney should evaluate the dispute and determine what the most effective timing for settlement discussions likely will be. Where the parties basically agree on the facts but disagree on the legal issues or the implications of the facts, an earlier mediation or settlement conference is probably better. However, if the

[21] Specific Aspirational Ideas at ll. 118, 122-24.
[22] Specific Aspirational Ideas at l. 119.

parties disagree about the facts, at least some discovery is probably going to be necessary to determine what the evidence would show, if the case eventually were to proceed to trial.

Once the case gets to a mediation or to formal settlement talks, the attorney should take as creative an approach as is necessary to achieve a resolution of the dispute. The parties may take a narrow view that a settlement has to consist of one party paying the other to resolve a claim. However, there is often more than one way to skin a cat. The attorney should carefully work with his or her client to determine the client's must-have goals for a negotiated resolution and then develop a plan to make those goals happen. The attorney should think creatively about less obvious ways to reach a settlement and should use a mediation statement or pre-mediation telephone call to prepare the mediator that a non-traditional approach to a deal may be required.

The attorney also should prepare the client that even if the case does not settle during the course of a one-day mediation, settlement at a later time is still possible. Our firm has frequently kept the mediator involved in settlement talks following a mediation and used the mediator's assistance to procure a settlement days or even weeks after the actual mediation day. Mediators almost always want the cases that they mediate to settle however necessary, so they are usually willing to continue to try to help the parties reach an agreement beyond just a one-day session.

C. Dealing With Court Inaction and Post-Pandemic Backlogs

The COVID-19 pandemic created an unprecedented challenge for courts. The statewide state of judicial emergency that lasted from March 13, 2020, through June 30, 2021, shut down large swaths of court operations and brough many parts of court operations to a standstill. Jury trials were shut down for months, came back for a while,

and then were suspended again as COVID cases surged at various times in Georgia. By the time jury trials resumed again and things returned to a state approaching "normal," there was a huge backlog of cases in the Georgia courts. This backlog will take several years to work its way through the system, and the courts give precedence to the resolution of criminal and family matters.

The question becomes how the attorney can deal with this backlog and the perception of inaction from the courts caused by months going by with little or no change in the case's status. For one thing, the attorney can work with the court to resolve motions and as much of the case as possible through the use of remote hearings. Courts and counsel have become quite adept at having oral arguments and presenting evidence through Zoom or other remote hearings over the course of the last two years. These remote proceedings are easier to schedule and less subject to cancellation than in-person proceedings. The attorney should be willing to handle all matters remotely that can be so handled to keep his or her cases moving.

Secondly, the attorney should respectfully remind the court regarding the attorney's cases that need attention from the court. If the court has held a hearing on a motion but has not entered an order and significant time has elapsed, the attorney can politely follow up with the court through an email to the staff attorney, being sure to copy counsel for all parties. Courts are very busy at any time but are particularly besieged working their way through the pandemic backlog, and oftentimes the squeaky wheel gets the grease. Therefore, it is appropriate to reach out and gently remind the courts about cases that need action at reasonable intervals. The attorney should not be calling and emailing chambers every other day, but an email sent every so often should not be viewed as impertinent or an irresponsible action by counsel.

It is possible that counsel's communications to the court could result in the needed order being issued or a requested hearing being scheduled. It is also possible that communications with the court could result in nothing happening. At the least, however, reaching out to the court allows the attorney to show his client that the attorney is attempting to move the client's case forward as best the attorney can. Ultimately, the attorney of course cannot force a court to act on a matter, as courts have the discretion to allocate their time and attention as they see fit. Yet, the attorney should continue to reach out politely and respectfully at such time intervals as the attorney sees fit until movement occurs and the client's case moves forward.